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Supreme Court, U.S.
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No. 02-575

In the Supreme Court of the United States

NIKE, INC., ET AL.,

Petitioners,

v.

MARC KASKY,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

AMICUS CURIAE BRIEF OF THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS[1]

The Civil Justice Association of California ("CJAC") is a twenty-five-year-old nonprofit organization whose membership is made up of hundreds of businesses, professional associations and local governments. Our principal purpose is to educate the public about ways to improve civil liability laws in terms of fairness, efficiency, economy and certainty. Toward these ends, CJAC regularly petitions the government – the judiciary, the legislature and, through the initiative process, the people themselves – for redress of laws concerning who pays, how much, and to whom when wrongful conduct is charged.

California's Unfair Competition Law ("UCL") has figured prominently in CJAC's efforts to restore some semblance of fairness and sanity to the scope and application of liability laws. Amended 60 years ago to codify the common law tort of "unfair competition," it has – largely from an expansive reading of its capacious language by courts – become a major source of unfairness to those ensnared by its ban on "business practices" deemed "unlawful, unfair or fraudulent . . .

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[1] All monetary contributions toward the preparation of this brief were made by CJAC; and the brief was written by CJAC's counsel and not at all by Nike, Inc. The brief is submitted pursuant to Rule 37 of the Rules of this Court, both petitioner and respondent having consented to its filing by letters filed with Clerk of the Court.

[or] unfair, untrue or misleading advertising." (Cal. B & P Code § 17200.)[2]

CJAC participated as amicus curiae in support of petitioner Nike, Inc. in the California Supreme Court and in urging this Court to grant certiorari from the decision because it impermissibly chills the rights of those who wish to publicly defend themselves against unfair attacks on their business practices. We argued that when, as here, it comes to publicly uttered statements by a company defending itself against charges that its overseas subcontractors are violating the laws of the countries in which they operate, the constitutional guarantee to freedom of expression trumps the ban of the UCL against false or misleading advertising. We now explain why prosecution under the UCL violates due process and other constitutional guarantees.

INTRODUCTION AND SUMMARY OF ARGUMENT

California's UCL impairs a number of due process and other constitutional rights beyond the First Amendment claim on which this Court granted review. These rights include the absence of adequate notice to those charged with violating it, repetitive punishment of defendants for the same acts, impermissible delegation of

[2] All code section references are, unless otherwise described, from the California Business and Professions Code.

governmental power to private parties, and extraterritorial reach of state regulation.

The UCL engenders these questions because, as applied and construed, it is an open-ended license to file abusive litigation. To those harboring social reform or entrepreneurial instincts, the siren call of the UCL is its broad definition of "unfair competition," a wrong described in the statute as any "unlawful, unfair or fraudulent business practice and unfair, deceptive, untrue or misleading advertising . . . ." (§ 17200.) The California Supreme Court has explained the Legislature intended this "sweeping language" to ban "anything that can properly be called a business practice and that at the same time is forbidden by law." (*Barquis v. Merchants Collection Assn.*, 7 Cal. 3d 94, 111 (1972) (citation omitted).) Later the court diffused this definition further by dropping the requirement of "illegality" and explaining that the UCL prohibits conduct that, though perfectly legal, may still be "unfair."[3]

Equally disturbing is the lack of *finality* to UCL litigation. A new and different plaintiff, purportedly acting on behalf of the same "general public," may sue the same defendant for the same activity resolved in a

[3] *Cel-Tech Communications v. Los Angeles Cellular Tel. Co.*, 20 Cal.4th 163 (1999). *See also Allied Grape Growers v. Bronco Wine Co.*, 203 Cal. App.3d 432, 448 (1998) (test under Section 17200 is that "practice merely be unfair"; actual fraud need not be shown).

previous UCL suit. Case after case can be brought under the UCL for the same conduct against the same defendant. According to a study by the state's Law Revision Commission, this makes the California law unique. "No statute of which we are aware in this state or nation confers the kind of unbridled standing to so many without definition, standards, notice requirements, or independent review . . . . [I]t is unclear who can sue for whom, what they have to do, whether it is final, and as to whom." (Robert Fellmeth, *Unfair Competition Act Enforcement by Agencies, Prosecutors, and Private Litigants: Who's on First?*, 15 CAL. REGULATORY L. RPTR., 1, 11 (1995).)

A major incentive for the UCL's assertion by potential plaintiffs is its dispensation from any requirement of "standing." No one, in fact, need suffer any concrete harm from, or be deceived by, the complained of conduct in order to sue under the UCL. A gripe against someone for something is, as this case shows, sufficient to bring a UCL suit and survive a challenge to standing.[4] If successful – and "success" in a

[4] As the appendix to this brief demonstrates, the claim asserted by the plaintiff in this case could not be brought under the analogous laws of any other state. Other states require proof of individualized harm or reliance for *private* enforcement actions under their unfair competition or false advertising laws, but relax that requirement when suit is brought by a public prosecutor. See, e.g., Colo. Code § 6-1-
(continued...)

UCL action may well be a settlement by defendant to avoid the cost of protracted litigation – a plaintiff may also recover a court-awarded attorney's fee for having vindicated the "public interest,"[5] a requirement partially satisfied by merely claiming that the suit was brought "for the interests of . . . the general public." (§ 17204.) The UCL does not provide "any mechanism to distinguish among" plaintiffs with genuine business disputes, "'true' private attorney[s] general," and those who use the law as a means of leveraging settlements for "tactical advantage" at the expense of the public interest. (*Unfair Competition Litigation*, 26 *CAL. L. REVISION*

[4](...continued)
113, *Hall v. Walter*, 969 P.2d 224, 235 (Co. 1998) (en banc), *May Dept. Stores Co. v. State*, 863 P.2d 967, 972-73 (Co. 1993) (en banc); Fla. Code Ann. §§ 817.41, 501.204, *Himes v. Brown & Secs. Corp.*, 518 So. 2d 937, 938 n.1 (Fla. Dist. Ct. App. 1987) (per curiam). Some states restrict enforcement of their unfair trade practices laws to public prosecutors (Iowa Code § 714.16(7); Minn. Stat. §325F.67), while others limit restitutionary relief under their laws to actions brought by the Attorney General. E.g, Alaska Stat. § 45.50.501(b); Ohio Rev. Code Ann. § 1345.07(F).

[5] If a plaintiff prevails in an unfair competition law claim, it may seek attorney fees as a private attorney general pursuant to Cal. Code of Civil Procedure section 1021.5. There is no provision for such a right for a successful defendant.

COMM'N REPORTS 191, 207 (1996).) "This invites 'blackmail' suits." (*Id.* at 208; citation omitted.)[6]

The UCL is also completely different from federal statutes such as the Federal Trade Commission Act,[7] upon which most state unfair competition and false advertising laws are modeled. The FTC Act provides *no* private remedy. (*See Pan American World Airways v. United States*, 371 U.S. 296, 306 (1963); *Alfred Dunhill, Ltd. v Interstate Cigar Co.*, 499 F.2d 232, 237 (2d Cir. 1974); *Holloway v. Bristol-Meyers Corp.*, 485 F.2d 986, 988-92 (D.C. Cir. 1973); *Carlson v. Coca-Cola Co.*, 483 F.2d 279, 280 (9th Cir. 1973).) Instead, the FTC Act authorizes suits *by the Commission* for injunctions and restraining orders, 15 U.S.C. § 53, and suits *by the Commission* for dishonest or fraudulent acts. (*Id.* at § 57b.)

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[6] The inevitable consequence of marrying the omnivorous UCL with ambitious lawyers desirous of reaching out and touching someone with a lawsuit to obtain an attorney fee is aptly described by a front page newspaper article. "They blanket the business world with hundreds of lawsuits at a time, often making claims that appear fanciful, even absurd. Most of the cases never get to trial. The lawyers make their money on settlements paid by defendants who just want to make the suits go away. The amounts typically are modest – from $2,000 to $50,000 – but they add up." (Monte Morin, *Lawyers Who Sue to Settle*, *LOS ANGELES TIMES*, Oct. 26, 2002, Pt. 1, p. 1.)

[7] 15 U.S.C. §§ 41-58.

The unprecedented nature of the UCL in these respects makes its constitutionality suspect. (*See, e.g.*, *Honda Motor Co. v. Oberg*, 512 U.S. 415, 427, 430 (1994) (holding Oregon procedure invalid under Due Process Clause where "[e]very other State in the Union" has adopted different procedure and "Oregon's abrogation of a well-established common-law protection against arbitrary deprivations of property raises a presumption that its procedures violate the Due Process Clause").)

STATEMENT OF THE CASE

Respondent Marc Kasky, a self-appointed representative of the public on whose behalf he brings suit,[8] claims that utterances by "just do it" athletic shoe maker Nike are "fraudulent" under the UCL. These statements were made by Nike in press releases and letters to the editor when it sought to defend itself against charges by its critics concerning the wages, hours, and working conditions in its subcontracted Asian shoe factories.

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[8] Cal. B & P C § 17204, which specifies who can bring UCL suits, "has been interpreted by the . . . Court to authorize standing for *any person or organization* to sue to enjoin an unfair practice, regardless of whether the person or organization has suffered injury as a result of the practice." McCall, Sturdevant, Kaplan & Hillebrand, *Greater Representation for California Consumers–Fluid Recovery, Consumer Trust Funds, and Representative Actions* (1995) 46 *HAST. L.J.* 797, 814-815 and authorities therein cited. (Italics added.)

The gravamen of the complaint is that "Nike's athletic shoes are made in overseas sweatshops," but there is no attempt in this UCL action to get directly at those "sweatshops" in the countries where they operate. Neither does respondent claim the UCL prohibits Nike from contracting with overseas companies who are in violation of their own country's laws on wages and working conditions. He has not, so far at least, attempted to "bootstrap" the violation of applicable foreign law by a Nike subcontractor onto the "unlawful" or "unfair" prongs of the UCL and thereby get at Nike in California, an approach which, if successful, would convert California courts applying the UCL into international ombudsmen, and jettison long established principles of national sovereignty and international law.

What respondent cannot accomplish directly by getting at the conduct to which he objects, however, he has so far achieved indirectly by getting at the "speech" given in defense of that conduct. This "indirection" is achieved by use of the "fraudulent" prong of the UCL against Nike because it contracts with foreign companies allegedly violating their own countries' labor laws. By categorizing Nike's statements in defense of its business dealings with its overseas subcontractors as "commercial speech," respondent claims, and a majority of the state's highest court agrees, that expression is subject to regulation in the form of UCL liability.

Now, it has long been a cornerstone of First Amendment jurisprudence that just because government can abolish an activity does not mean that it can suppress "speech" concerning that activity.[9] While creation of the "commercial speech" category has resulted in occasional backsliding from this principle,[10] respondent and California's high court have stood it on its head—*i.e.*, while state law can do nothing directly about the objected to conduct of foreign "sweatshops," the UCL imposes liability on any speech in defense of these charges which is "misleading or false."

If this seems a bit of an overstatement, it is not. The UCL does not define what is a "business practice," but it is clear it can be a single past act and is likely as broad as the business practices that come within the sweep of the Unruh Civil Rights Act, Cal. Civ. C. §51: "[e]verything about which one can be employed," and "synonymous with calling, occupation, or trade engaged in for the purpose of making a livelihood or gain."[11]

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[9] See, e.g., *Pickering v. Board of Education*, 391 U.S. 563 (1968) (though school board may terminate from employment a non-tenured teacher for no reason whatsoever, it cannot fire her for writing a letter to the editor of which it disapproved.).

[10] See, e.g., *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 345 (1986).

[11] *Burks v. Poppy Construction Co.*, 57 Cal.2d 463, 468

(continued...)

Carried to the limits of its logic, respondent's position, sanctioned by the state supreme court, permits maintenance of a UCL action against a newspaper that "misleadingly" defends the labor practices of Nike's Asian subcontractors. After all, publication of the "misleading" article, editorial or advertisement would be done in the course of the newspaper's business practice. It would undoubtedly be in furtherance of a "commercial transaction," i.e., selling the newspaper to readers and the advertisement to those who pay to run it. Ironically, a boycott of Nike goods by respondent and those who wish to bring pressure on Nike to improve its foreign subcontracting business is protected by the First Amendment[12] but, according to California's high court, a rebuttal to that boycott must be judicially monitored under the UCL for its truthfulness.

Respondent and the narrowest majority possible of the California Supreme Court would, in other words, have the government instead of the public act as arbiter of what is "true" and "false" in public debate over compliance by foreign subcontractors with the laws of the countries where they do business. This is not a role the constitution favors for government. "[Authoritative]

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[11](...continued)
(1962).

[12] *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (economic boycott by civil rights organization protected by First Amendment).

interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth – whether administered by judges, juries, or administrative officials – and especially one that puts the burden of proving truth on the speaker."[13]

Unless this Court reverses the decision below, those who do business in California will be subject to government regulation through this strict liability law for publicly defending their business practices. This is an *in terrorem* means of regulation because the UCL is unprecedented in terms of the breadth of its scope, its absence of any standing requirements and the lack of finality in its application. Accordingly, the UCL raises grave constitutional questions, even apart from the First Amendment.

ARGUMENT

I. THE UCL VIOLATES DUE PROCESS BECAUSE IT FAILS TO PROVIDE ADEQUATE NOTICE OF PROHIBITED CONDUCT.

The UCL authorizes potentially massive civil liability even when a defendant's conduct is not contrary to existing state statutes or judicial decisions, and even when the defendant has no notice of his potential liability.

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[13] *New York Times Co. v. Sullivan*, 376 U.S. 254, 270-271 (1964).

The elements of a violation under the UCL are amorphous and elastic. "Unfair" simply means any practice "whose harm to the victim outweighs its benefits." (*Saunders v. Superior Court*, 27 Cal. App. 4th 832, 839 (1994).) Whatever that may mean as an intelligible guide to one's future conduct, conformity to law does not satisfy it. An unfair practice may be deemed actionable even if it is not unlawful. This "weighing" of benefits and harms is a squishy calculus, utterly devoid of any "bright line" standard for determining what is allowed and what is forbidden. Indeed, this "unfair" test raises more questions than it provides answers, a principal one being, "Who counts as a 'victim' and how is 'harm' to be 'weighed' when no 'harm' or 'actual injury' is required to bring suit under the UCL?"

"Fraudulent," the prong in the UCL upon which respondent rests his case, does not, we have seen, "refer to the common law tort of fraud, but only requires a showing that members of the public are likely to be deceived." (*Saunders, supra.*, 27 Cal. App. 4th at 839; citation omitted.) Thus neither the plaintiff nor any real person need actually be deceived or rely upon the challenged statements. In fact, as with the prohibition against misleading advertising under the UCL, the ban on engaging in a "fraudulent business practice" extends to misleading representations that are quite literally true. (*Committee on Children's Television v. General Foods Corp.*, 35 Cal.3d 197, 211 (1983).) In 1992, the

Legislature overruled precedent limiting the statute's application to cases of multiple transactions.[14] Thus, even a single episode of past conduct that is "likely to deceive" if repeated may give rise to liability.[15]

"Unlawful" under the UCL means conduct or, in this case, "speech" in violation of *any* law – whether federal, state or local – including statutes, regulations, ordinances and even court rules. (*See Hewlett v. Squaw Valley Ski Corp.*, 54 Cal.App.4th 499, 533 (1997).) Should any law from this seemingly bottomless compendium expire for going beyond its own limitations period, the UCL can, by giving it a "toehold" to its unlawful prong, revive and extend it up to four years. (*Cortez v. Purolator Air Filtration Products Co.*, 23 Cal.4th 163, 178-179 (2000).) Never fear that the plaintiff lacks standing under the "predicate" law to sue the defendant, because by "bootstrapping" the predicate statute to the UCL's "unlawful" prong a plaintiff can strip away that otherwise troubling "standing" barrier. (*Midpeninsula Citizens for Fair Housing v. Westwood Investors*, 221 Cal.App.3d 1377, 1393 (1990); *Consumers*

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[14] *See State of California ex rel. Van de Kamp v. Texaco, Inc.*, 46 Cal. 3d 1147, 1169-117 (1988) (" 'practice' requirement envisions something more than a single transaction").

[15] *See Stop Youth Addiction v. Lucky Stores*, 17 Cal. 4th 553, 570 (1998); *United Farm Workers of America, AFL-CIO v. Dutra Farms*, 83 Cal. App.4th 1146, 1163 (2000).

Union of the United States, Inc. v. Fisher Development, Inc., 208 CalApp.3d 1433, 1443-1444 (1989.)

This case illustrates the abusive nature of the UCL. There is no way Nike could, from reading the UCL, have reasonably known that defending itself publicly and denying charges it contracted with overseas sweat shops would make it strictly liable to anyone who disagreed with those statements. Any person can, like Nike, find itself subject to crushing liability under the UCL with no prior notice that its conduct was unlawful. This prospect offends the basic due process principle that a defendant must be afforded fair notice of what is prohibited. "It is scarcely consistent with ordered liberty that the amenability of an individual to punishment should be judged solely upon the sum total of badness or detriment to the legitimate interests of the state which can be found, or inferred, from a backward looking appraisal of his trial record."[16]

This Court has held that "a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits . . . ." (*Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03 (1966).)

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[16] Anthony G. Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 81 (1960).

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

(*Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *see also City of Chicago v. Morales*, 527 U.S. 41, 58 (1999) (plurality) (invalidating municipal anti-loitering ordinance because "the purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her conduct to the law").)

The vagueness doctrine is not limited to criminal penalties.[17] In *Giaccio v. Pennsylvania*, 382 U.S. 399, 402

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[17] *See Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, (continued...)

(1966), this Court expressly repudiated any distinction between civil and criminal measures for purposes of the vagueness doctrine.[18] In the punitive damages context, for example, this Court has held that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." (*BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574 (1996).)

The vice of a vague law is particularly pernicious when, as here, the conduct upon which it seeks to impose liability is intertwined with expression that is constitutionally protected. "[E]rroneous statement is

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[17](...continued)
455 U.S. 489, 498-99 (1982); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 290 (1982) ("[T]he definition of 'connections with criminal elements' in the city's ordinance is so vague that a defendant could not be convicted of the offense of having such a connection; we may even assume, without deciding, that such a standard is also too vague to support the denial of an application for a license to operate an amusement center.").

[18] *See* 382 U.S. at 402 ("Both liberty and property are specifically protected by the Fourteenth Amendment against any state deprivation which does not meet the standards of due process, and this protection is not to be avoided by the simple label a State chooses to fasten upon its conduct or its statute. So here this state Act whether labeled 'penal' or not must meet the challenge that it is unconstitutionally vague.").

inevitable in free debate," [and error, too,] "must be protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive.' " (*New York Times v. Sullivan*, *supra*, 376 U.S. at 272-273.) Courts apply strict scrutiny to vague laws that impinge on free expression. (*Burson v. Freeman*, 504 U.S. 191, 198 (1992).) "Objections to vagueness under the Due Process Clause rest on the lack of notice . . . Vagueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand . . .." (*Maynard v. Cartwright*, 486 U.S. 356, 361 (1988).) "We have been especially intolerant of vague statutes in the First Amendment area." (*Pope v. Illinois*, 481 U.S. 497, 515, fn. 8 (1987)(dissenting opinion by Justice Stevens).)

The UCL violates this bedrock principle of due process. It fails to provide constitutionally adequate notice of prohibited conduct or to provide proper standards confining the discretion of enforcing courts.

II. THE UCL VIOLATES DUE PROCESS BY CREATING AN IMPERMISSIBLE RISK THAT DEFENDANTS WILL BE SUBJECT TO REPETITIVE SUITS FOR THE SAME CONDUCT.

The UCL creates an impermissible potential for multiple, repetitive suits by interlopers seeking to sue on the behalf of victims of perceived illegality. "The potential for a multiplicity of actions under the unfair competition law and overlapping or parallel proceedings is troublesome. Some commentators have termed this prospect the 'two-front' war. This situation can result because there is no limitation on multiple plaintiffs seeking relief for the same injury to the general public." (*Unfair Competition Litigation*, 26 CAL. L. REVISION COMM'N REPORTS at 209 (footnote omitted).)

Allowing multiple plaintiffs repetitively to punish a defendant's unitary course of conduct fundamentally conflicts with what this Court long ago called "the maxim" in civil cases "that no man shall be twice vexed for one and the same cause. *Nemo debet bis vexari pro una et eadem causa.*" (*Ex Parte Lange*, 85 U.S. (18 Wall.) 163, 168-69 (1874).)[19]

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[19] This issue is related to the question of multiple punishment presented in *State Farm Mut. Automobile Ins. Co. v. Campbell*, No. 01-1289 (U.S. S. Ct., pending).

Although the Double Jeopardy Clause is limited to criminal penalties, numerous courts have indicated that repetitive civil judgments for the same misconduct violates due process. Judge Henry Friendly is one of the most prominent jurists who holds this viewpoint. (*See Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839-40 (2d Cir. 1967) (Friendly, J.).) In *Juzwin v. Amtorg Trading Corp.*, 705 F. Supp. 1053 (D.N.J. 1989), *vacated on other grounds*, 718 F. Supp. 1233 (D.N.J. 1989), for example, the court concluded that "due process places a limit on the number of times and extent to which a defendant may be subjected to punishment for a single course of conduct. Regardless of whether a sanction is labelled 'civil' or 'criminal' in nature, it cannot be tolerated under the requirements of due process if it amounts to unrestricted punishment." (*Id.* at 1064.) "Common sense dictates that a defendant should not be subjected to multiple civil punishment for a single act or unified course of conduct which causes injury to multiple plaintiffs." *In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 900 (N.D. Cal. 1981), *vacated on other grounds*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983).[20]

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[20] *See In re Federal Skywalk Cases*, 680 F.2d 1175, 1188 (8th Cir. 1982) (Heaney, J. dissenting) ("Unlimited multiple punishment for the same act determined in a succession of individual lawsuits and bearing no relation to the defendants' culpability or the actual injuries suffered by victims, would

(continued...)

The UCL creates an impermissible risk of repetitive punishment because there is no finality to that litigation. A suit by one plaintiff does not prevent another self-appointed "private attorney general" from suing the same defendant on precisely the same theory. UCL suits are not class actions.[21] California courts have

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[20](...continued)
violate the sense of 'fundamental fairness' that is essential to constitutional due process."); *In re "Agent Orange" Product Liability Litigation*, 100 F.R.D. 718, 728 (E.D.N.Y. 1983) (Weinstein, J.), *mandamus denied*, 725 F.2d 858 (2d Cir.), *cert. denied*, 465 U.S. 1067 (1984) ("There must, therefore, be some limit, either as a matter of policy or as a matter of due process, to the amount of times defendants may be punished for a single transaction."); *see also Dunn v. HOVIC*, 1 F.3d 1371, 1385-87 (3d Cir.), *cert. denied*, 510 U.S. 1031 (1993); *Edwards v. Armstrong World Industries, Inc.*, 911 F.2d 1151, 1155 (5th Cir. 1990); *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277 (2d Cir. 1990); *Johnson v. Celotex Corp.*, 899 F.2d 1281 (2d Cir.), *cert. denied*, 498 U.S. 920 (1990); *Racich v. Celotex Corp.*, 887 F.2d 393 (2d Cir. 1989); *In re School Asbestos Litig.*, 789 F.2d 996 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986); *Jackson v. Johns-Manville Sales Corp.*, 727 F.2d 506 (5th Cir. 1984) (*Jackson I*); 750 F.2d 1314 (5th Cir. 1985) (*Jackson II*);781 F.2d 394 (5th Cir. 1986) (*Jackson III*); *Sealover v. Carey Canada*, 793 F. Supp. 569, 582 (M.D.Pa. 1992); American Law Institute, REPORTERS' STUDY: ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 260-64 (1991); John C. Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 U. VA. L. REV. 139 (1986).

[21] *See Kraus v. Trinity Management Services, Inc.*, 23 (continued...)

held that nonparties cannot be bound to prior judgments involving UCL claims by different plantiffs. (*See Bronco Wine Co. v. Frank A. Logoluso Farms*, 214 Cal. App. 3d 699, 717 (1989).) Accordingly, the UCL violates the due process right of defendants to be free from multiple, repetitive punishment for the same course of conduct.

III. THE UCL IMPERMISSIBLY DELEGATES GOVERNMENTAL POWER TO PRIVATE PERSONS.

Ordinarily, states are free to create their own standing rules. (*See ASARCO v. Kadish*, 490 U.S. 605, 617 (1989).) The UCL, however, does something quite different when it obliterates any semblance of a standing requirement – it turns over the machinery of state government to politically unaccountable private plaintiffs acting as bounty hunters. The plaintiff in this

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[21](...continued)
Cal. 4th 116 (2000); *Dean Witter Reynolds, Inc. v. Superior Court*, 211 Cal. App. 3d 758, 773 (1989) ("The court in such a suit is empowered to grant equitable relief, including restitution in favor of absent persons, without certifying a class action," even though "[a]bsent persons generally are not bound by a judgment unless they were in privity with a party and the adjudication of their rights comports with due process."); *Caro v. Procter & Gamble Co.*, 18 Cal. App. 4th 644, 661 (1993) ("In a suit arising under Business and Professions Code section 17200 et seq., the court 'is empowered to grant equitable relief, including restitution in favor of absent persons, without certifying a class action.' " (citation omitted)).

case, who is acting essentially as a professional litigant, demonstrates the danger created by the UCL. "[P]ursuant to section 17200 as construed by this court and the Courts of Appeal, 'a private plaintiff who has himself suffered no injury at all may sue to obtain relief for others.'" (*Stop Youth Addiction v. Lucky Stores*, *supra*, 17 Cal. 4th at 561.) In *Stop Youth Addiction*, for example, the California Supreme Court held a private person may sue to enforce penal laws even where the Attorney General and law enforcement officials oppose the suit.

Under the UCL, any unelected, unaccountable social engineer or gadfly can prosecute the law independent of the Attorney General or District Attorneys. State administrative and criminal law is transformed by the UCL into a body of civil law giving rise to private causes of action. Defendants cannot protect themselves even if they enter into agreements or consent decrees with the Attorney General and other governmental officials. As this Court has opined, *qui tam* relators have "different incentives" from the government, which usually involve money "rather than the public good." (*Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949-50 (1997).) The same is true of UCL plaintiffs.

Moreover, the UCL authorizes a private person to sue even if the substantive cause of action does not. The UCL borrows violations of other laws and treats

them as independently actionable unlawful practices. The "unlawful" practices prohibited are "any practices forbidden by law -- be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made. It is not necessary that the predicate law provide for private civil enforcement." (*Wang v. Massey Chevrolet*, 97 Cal. App. 4th 856, 871 (2002).)

"[E]ven though a specific statutory enforcement scheme exists, a parallel action for unfair competition is proper pursuant to applicable provisions of the Business and Professions Code." (*People v. McKale*, 25 Cal. 3d 626, 632 (1979).) "Virtually any law -- federal, state or local -- can serve as a predicate for an action under Business and Professions Code, section 17200." (*Smith v. State Farm Mutual Automobile Ins. Co.*, 93 Cal. App. 4th 700, 718 (2001).)[22]

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[22] *See, e.g., Samura v. Kaiser Foundation Health Plan, Inc.*, 17 Cal. App. 4th 1284, 1299, n.6, (1993), *review denied*, 1993 Cal. LEXIS 6487 (Cal. Dec. 16, 1993), *cert. denied*, 511 U.S. 1084 (1994) (recognizing right of private plaintiff to sue to enjoin acts made unlawful by the Knox-Keene (HMO licensing) Act); *Committee on Children's Television, Inc. v. General Foods Corp.*, *supra*, 35 Cal. 3d at 210-11 (unfair competition action available to remedy cereal adulteration and misbranding, despite existence of criminal penalties under Sherman Law); *Rubin v. Green*, 4 Cal. 4th 1187, 1204 (1993) (unfair competition action proper to remedy improper solicitation of litigation clients, notwithstanding existence of "additional sanctions against attorney solicitation" available

(continued...)

The UCL thus raises two related constitutional questions. First, permitting private plaintiffs to enforce *federal statutes* that do not contain private rights of action raises a serious issue of separation of powers. It usurps the congressional prerogative of deciding whether to include a private remedy as an appropriate enforcement mechanism. It also " 'impermissibly undermines' the powers of the Executive" with respect to the public enforcement of federal law. (*Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 856 (1986).) This Court has opined that converting "the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts" would "transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take care that the Laws be faithfully executed,' Art. II, § 3." (*Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992).) "It would enable the courts . . . 'to assume a position of authority over the governmental acts of another and co-equal department,' and to become 'virtually continuing monitors of the wisdom and soundness of Executive action.' " (*Id.*; citations omitted.)

Second, permitting UCL plaintiffs to enforce *state* law gives rise to serious federal constitutional questions. This Court has long condemned the delegation to

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[22](...continued)
to "the State Bar and prosecutorial authorities").

private plaintiffs of a power obviously governmental in character, particularly when the delegation is made to someone in an adverse position to the aggrieved party. "[I]n the very nature of things, one person may not be entrusted with the power to regulate the business of another, and especially of a competitor." (*Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) (striking down statute delegating power to private persons to draw up regulatory codes); *cf. Gibson v. Berryhill*, 411 U.S. 564, 578-79 (1973) (plaintiff may not be required to exhaust an administrative remedy that is in the hands of a board composed of his potential competitors); *Fuentes v. Shevin*, 407 U.S. 67, 93 (1972) (replevin statutes allowing private parties to repossess property based on ex parte averments impermissibly "abdicate effective state control over state power"); *Eubank v. Richmond*, 226 U.S. 137 (1912) (invalidating city ordinance which conferred power to establish building setback lines upon the owners of two-thirds of the property abutting any street).)

In fact, for a state government to abdicate the basic machinery of law enforcement to private plaintiffs would raise questions under the Republican Form of Government Clause, Article IV, § 4, because it would eliminate politically accountable leadership responsible for lawmaking and law enforcement responsibilities. The UCL eliminates the ability of citizens to hold state government officials accountable for prosecutorial

decisions regarding the manner in which state laws are enforced.[23]

IV. THE UCL IMPOSES IMPERMISSIBLE EXTRATERRITORIAL REGULATION.

The UCL also raises serious constitutional questions because it extends California law extraterritorially to cover nationwide business conduct. Section 17200 was amended a decade ago to clarify that it authorized injunctive relief against out-of-state conduct. In *Yu v. Signet Bank/Virginia*, 69 Cal. App. 4th 1377, 1392 (1999), for example, the court held that California residents could invoke the UCL to sue a Virginia bank under California law on the basis of the bank's allegedly unfair practice of suing its out-of-state credit card holders in Virginia. The court held that

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[23] *See* Hans A. Linde, *When Initiative Lawmaking is Not "Republican Government": The Campaign Against Homosexuality*, 72 Or. L. Rev. 19, 33-45 (1993). Although claims under the Clause have traditionally been regarded as non-justiciable, *see Luther v. Borden*, 48 U.S. (7 How.) 1, 42 (1849) (choice between rival state governments is for Congress, not the courts), in *New York v. United States*, 505 U.S. 144 (1992), this Court has suggested that the Clause might be interpreted as conferring judicially cognizable rights, although it indicated that "[w]e need not resolve this difficult question today." (*Id.* at 185.) The Court noted that the challenged law did not violate the Republican Form of Government Clause because "state government officials remain accountable to the local electorate." (*Id.*) The UCL, in contrast, eliminates such accountability.

whether the practice might be entirely lawful in Virginia was irrelevant on the supposed ground that California could "punish the conduct of an out-of-state defendant if it has an impact on [plaintiffs] regardless of whether the conduct might be lawful elsewhere." (*Id.*)

Indeed, in this case, Nike's speech was hardly confined to California. Yet the California courts have shown no interest in confining their application of the UCL to California's borders. California's assertion of nationwide regulatory jurisdiction violates the dormant Commerce Clause[24] and principles of federalism.

For example, in *White v. Ford Motor Co.*, 2002 WL 31687641 (9th Cir. Dec. 3, 2002), the Ninth Circuit held a California punitive damages award could not be based on out-of-state sales of allegedly defective pick-up trucks, even if the trucks qualified as "defective" under the product liability laws of every relevant jurisdiction. *White* followed this Court's decision in *BMW v. Gore*, *supra*, 517 U.S. 559, which held, based on "principles of state sovereignty and comity," "punitive damages may not be imposed to punish lawful conduct in other States." (*Id.* at 572.) The power of each State is

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[24] The "dormant Commerce Clause" invalidates state laws that unduly burden interstate commerce, which Congress is authorized to regulate by Article I. See generally *Pike v. Bruce Church*, 397 U.S. 137 (1970) (invalidating a state official's order regarding cantaloupe packaging as burdensome on interstate commerce).

"constrained by the need to respect the interests of other States" because no single State has the authority to impose "policy for the entire nation, . . . or even impose its own policy choices on neighboring States." (*Id.* at 517.) This issue is related to the question of extraterritorial punishment presented in *State Farm Mut. Automobile Ins. Co. v. Campbell*, No. 01-1289 (U.S. S. Ct., pending). Lower courts have recognized these principles prohibit punishing out-of-state conduct even where it is unlawful where it occurs.[25]

It has long been settled that each State "can legislate only with reference to its own jurisdiction." (*Broderick v. Rosner*, 294 U.S. 629, 643 (1935).) "The legislative authority of every State must spend its force within the territorial limits of the State." (Thomas M. Cooley, CONSTITUTIONAL LIMITATIONS 127-28 (1868).) "Laws have no force of themselves beyond the

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[25] *See Continental Trend Resources, Inc. v. OXY USA Inc.*, 101 F.3d 634, 637 (10th Cir. 1996) ("[W]e read the [*BMW*] opinion to prohibit reliance upon inhibiting unlawful conduct in other states."); *Johansen v. Combustion Engineering, Inc.*, 170 F.3d 1320, 1333 (11th Cir. 1999); *Ace v. Aetna Life Ins.*, 40 F. Supp.2d 1125, 1133 (D. Alaska 1999); *see also* Margaret M. Cordray, *The Limits of State Sovereignty and the Issue of Multiple Punitive Damages Awards*, 78 OR. L. REV. 275, 308 (1999) ("When one state imposes punitive damages, using its own substantive and procedural standards for awarding punitive damages, based on the defendant's extraterritorial conduct, that state projects its own regulatory choices regarding punitive damages onto other states.").

jurisdiction of the state which enacts them, and can have extraterritorial effect only by the comity of other states." (*Huntington v. Attrill*, 146 U.S. 657, 669 (1892).) "No State can legislate except with reference to its own jurisdiction." (*Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881).) Thus, a State may not regulate conduct in other State "merely because the welfare and health of its own citizens may be affected when they travel" to that State. (*Bigelow v. Virginia*, 421 U.S. 809, 823-24 (1975).)

This Court held the dormant Commerce Clause also prevents States from regulating outside their borders. (*See, e.g., C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 393 (1994) ("States and localities may not attach restrictions to exports or imports in order to control commerce in other states."); *Healy v. Beer Institute*, 491 U.S. 324 (1989) (striking down law requiring out-of-state beer shippers to affirm competitiveness of prices for state residents); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 583 (1986) (similarly ruling with respect to New York liquor price affirmation law); *Edgar v. MITE Corp.*, 457 U.S. 624, 644 (1982) (striking down law allowing Illinois Secretary of State to evaluate fairness of any takeover offer for the shares of an Illinois company regardless of residency of shareholders); *Southern Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761 (1945) (invalidating Arizona train law governing length of trains in state as disruptive of interstate commerce).)

The UCL offends these principles. It projects California law extraterritorially by authorizing California courts to punish conduct or speech that offends the UCL's vague provisions no matter where it occurs. It does not matter whether the conduct challenged is perfectly legal under the law of the defendant's domicile or under the law of the forum where the conduct occurs. So long as a California court can identify a jurisdictional basis, it is apparently free to override the prerogatives of sister States by applying the UCL. Such global extension of California law outside the State's borders raises serious constitutional questions under the dormant Commerce Clause and principles of federalism.

CONCLUSION

For all the aforementioned reasons, the judgment of the California Supreme Court should be reversed.

Respectfully submitted,

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APPENDIX A

Unfair Trade Practice Laws and False Advertising Laws

Chart I: Assessing the Reasons Why Kasky's Claim Would Fail in Each Respective State

State	Unfair Trade Practice Law	False Advertising Law
Alabama	**No injury;** Monetary damage to consumer is required - private right of action depends on whether plaintiff suffered any monetary damages as a result of the defendant's actions. See, Billions v. White & Stafford Furn. Co., 528 So. 2d 878 (Ala. Civ. App. 1988).	**No private action, no product reference** (the false or misleading statement must be made in connection with the promotion of a sale - § 13A9-42)
Alaska	**No injury (required for damages);** Harm (but not actual monetary damages) is required to recover damages under §45.50.531(a). **Not a "victim" (required for injunctive relief):** "any person who was the victim of the unlawful act, whether or not the person suffered actual damages, may bring an action to obtain an injunction." Alaska Stat. §45.50.535(a)	No separate FAL
Arizona	**No injury:** Arizona provides an implied private right of action for compensatory and punitive damages, *Dunlap v. Jimmy GMC, Inc.*, 666 P.2d 83, 87 (Ariz. Ct. App. 1983), and thus likely for injunctive relief as well. To state such a claim, the plaintiff must prove (1) a misrepresentation and (2) the plaintiff's consequent and proximate injury. *Id.*	**No private cause of action** (§44-1481, See, Ward v. Fireman's Fund Ins. Co., 152 Ariz. 211, (Ct. App. 1986). **No product reference** (must make misleading misrepresentation of the product - §44-1481(a)(1).)
Arkansas	**No injury;** "Any person who suffers actual damage or injury as a result of an offense or violation as defined in this chapter has a cause of action to recover actual damages, if appropriate, and reasonable attorney's fees." Ark. Code Ann. § 4-88-113(f)	No separate FAL
Colorado	**No injury; not an actual/potential consumer:** "An action under this section shall be available to any person who: Is an actual or potential consumer of the defendant's goods, services, or property and is injured as a result of such deceptive trade practice." Col. Gen Stat. **§6-1-113(1)(a)**	**No private cause of action** (criminal code - §18-5-301)
Connecticut	**No injury;** person "must suffer ascertainable loss of money or property as a result of the act or practice" of the company. Conn. Gen. Stat. §42-110g(a)	No separate FAL
Delaware	**No likelihood of injury:** only person "likely" to be damaged by a deceptive trade practice can bring suit. Title 6 Del Code Ann. §2533(a)	**No private cause of action** (criminal code - Del Code Ann. §906)
Florida	**No injury:** action must be "brought by a person who has suffered a loss as a result of a violation." Fla. Stat. Ann. §501.211(2)	**No private cause of action** (criminal code Fla. Stat. Ann. §817.40-47)
Georgia	**No likelihood of injury;** "A person likely to be damaged by a deceptive trade practice of another may be granted an injunction against it ... Proof of monetary damage, loss of profits, or intent to deceive is not required." §10-1-373. **Injunction is only remedy:** *Id., See also, Lauria v. Ford Motor Co.*, 169 **Ga.** App. 203, 312 S.E.2d 190 (1983) (The "sole remedy provided under this section is injunctive relief.").	**No private cause of action** (criminal code §10-1-421)

Hawaii	**If no injury, only injunction available:** Hawaii amended its deceptive practices statute in June to allow "[a]ny person [to] bring an action based on unfair methods of competition." Haw. Stat. Ann. § 480-2(e). But the standing limits on seeking private remedies survive this amendment: only people "injured in [his or her] business or property," *id.* § 480(a), or suffering other "injur[y]," *id.* § 480-13(b) can take advantage of Hawaii's remedies.	**No private cause of action;** (criminal code Haw. Stat. Ann. §708-871) **No product reference;** "false advertising if in connection with the promotion of the sale" Haw. Stat. Ann. §708-871.
Idaho	**No purchase; no ascertainable injury**: "Any person who purchases or leases goods or services and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful by this act, may treat any agreement incident thereto as voidable or, in the alternative, may bring an action to recover actual damages." Idaho Code § 48-608(1).	No separate FAL
Illinois	**No injury;** "Any person who suffers actual damage as a result of a violation of this Act committed by any other person may bring an action against such person. The court, in its discretion may award actual economic damages or any other relief which the court deems proper." 815 ILCS § **505/10a.**	**No private cause of action** (criminal code 720 ILCS §2951/a)
Indiana	**No reliance; No injury;** "A person relying upon an uncured or incurable deceptive act may bring an action for the damages actually suffered as a consumer as a result of the deceptive act." IC §24-5-0.5-3(a).	**No private cause of action** (criminal code IC 35-43-5-3)
Iowa	**No private cause of action;** act is enforced by AG (Iowa Code §714.16(15))	No separate FAL
Kansas	**No injury:** only a consumer who is "aggrieved by an alleged" deceptive act can bring suit – "Whether a consumer seeks or is entitled to damages or otherwise has an adequate remedy at law or in equity, a consumer aggrieved by an alleged violation of this act may bring an action." Kan. Stat. Ann. §50-634(a)	No separate FAL
Kentucky	**No injury; no purchase; no reliance**: "Any person who purchases ... goods or services ... and thereby suffers any ascertainable loss of money or property ... as a result ... of a method, act or practice declared unlawful ... may bring an action." Ky. Rev. Stat. Ann. §367.220	**No private cause of action** (criminal code Ky. Rev. Stat. Ann.§517.030)
Louisiana	**No financial injury; representative capacity not allowed:** "Any person who suffers any ascertainable loss of money or movable property... as a result of ... an unfair or deceptive method... may bring an action individually but not in a representative capacity to recover actual damages." § La. R.S. 51:1409(a)	No separate FAL

Maine	**No purchase; no injury;** Any person who purchases or leases goods... and thereby suffers any loss of money or property, ... as a result ... of a method, act or practice declared unlawful ... may bring an action ... for actual damages, restitution and for such other equitable relief, including an injunction." Me. Rev. Stat. Ann. tit. 5 §213). See also Me. Rev. Stat. Ann. tit. 10 §1213 (injunction only is available under this section)	**No private cause of action** (criminal code Me. Rev. Stat. Ann. tit. 17-A §901)
Maryland	**No injury:** "Any person may bring an action to recover for injury or loss sustained by him as the result of a practice prohibited by this title." Md. Code Ann. Comm. Law I § 13-408(a)	**Not material/no product reference;** "To determine if an advertisement is misleading, the following... shall be considered: (2) The extent to which the advertisement fails to reveal a fact which ... is material with respect to the advertised commodity." **No private cause of action** (criminal code, Md. Code Ann. Comm. Law I §11-704)
Massachusetts	**No injury; no causation:** Any person ... who has been injured by another person's use or employment of any method, act or practice declared to be unlawful ...may bring an action in the superior court... for damages and such equitable relief, including an injunction." 93A MGL §9(1)	**No private cause of action** (criminal code 266 MGL §91)
Michigan	**No injury;** "a person who suffers loss as a result of a violation of this act may bring an action to recover actual damages" Mich. Stat. Ann. §445.911(2)	**No injury; no reliance** "a person who suffers loss as a result of a violation of this act ... may bring an individual or a class action to recover actual damages" Mich. Stat. Ann. §445.360(2)
Minnesota	**No injury/ likelihood of injury (injury is required when seeking damages, likelihood of injury is required for injunction)** See: *Group Health Plans v. Philip Morris, Inc.*, 621 N.W.2d 2 (Minn. 2001) and Minn. Stat. §325D.45 ("A person likely to be damaged by a deceptive trade practice of another may be granted an injunction against it under the principles of equity and on terms that the court considers reasonable. Proof of monetary damage, loss of profits, or intent to deceive is not required.")	**Enforced by the AG:** "The duty of a strict observance and enforcement of this law and prosecution for any violation thereof is hereby expressly imposed upon the attorney general" – Minn. Stat. **§325F.67**
Mississippi	**No purchase; no injury;** "Any person who purchases or leases goods or services ... and thereby suffers any ascertainable loss of money or property, ... as a result ... of a method, act or practice prohibited by Section 75-24-5 may bring an action ... to recover such loss of money or damages for the loss of such property." Miss. Code. Ann. §75-24-15(1)	**No private cause of action** (criminal code Miss. Code. Ann. §97-23-1)

Missouri	**No purchase; no injury;** "Any person who purchases or leases merchandise ... and thereby suffers an ascertainable loss of money or property... as a result ... of a method, act or practice declared unlawful by section 407.020, may bring a private civil action ... to recover actual damages." Mo. Rev. Stat. § 407.025(1)	**No private cause of action** (criminal code Mo. Rev. Stat. §570.160)
Montana	**No purchase; no injury/loss** "Any person who purchases or leases goods or services primarily for personal, family, or household purposes and thereby suffers any ascertainable loss of money or property, ... as a result of ... a method, act, or practice declared unlawful by 30-14-103 may bring an individual but not a class action." Mt. Stat. §30-14-133(1)	**No private cause of action** (criminal code Mt. Stat. §45-6-317)
Nebraska	**No injury:** "Any person who is injured ... may bring a civil action in the district court to enjoin further violations, to recover the actual damages sustained by him, or both." Neb. Rev. Stat. Ann § 59-1609. Only equitable relief is available under the Uniform Deceptive Trade Practices Act; money damages cannot be recovered. See Al'Amin v. McDonalds Corp., -- F. Supp. 2d --, 2001 U.S. Dist. LEXIS 14274, (D. Neb. 2001).	**No private cause of action** (criminal code Neb. Rev. Stat. Ann §28-1476)
Nevada	**Not a victim; no equitable relief:** " An action may be brought by any person who is a victim of consumer fraud. (3) If the claimant is the prevailing party, the court shall award him: (a) Any damages that he has sustained; and (b) His costs in the action and reasonable attorney's fees. Nev. Rev. Stat. Ann. §41-600(3)	**No private cause of action** (criminal code Nev. Rev. Stat. Ann. §207.171)
New Hampshire	**No injury:** "Any person injured by another's use of any method, act or practice declared unlawful under this chapter may bring an action for damages and for such equitable relief, including an injunction, as the court deems necessary and proper." N.H. Rev. Stat. §358-A:10(I)	**No private cause of action** (criminal code N.H. Rev. Stat. §638:6)
New Jersey	**No loss/injury:** "Any person who suffers any ascertainable loss of moneys or property, real or personal, as a result of ... any method, act, or practice declared unlawful under this act or the act hereby amended and supplemented may bring an action ... in any court of competent jurisdiction." N.J. Stat. Ann § 56:8-19	No separate FAL

New Mexico	**No likelihood of injury (likelihood of harm required for injunction); equitable relief limited to injunction:** "A person likely to be damaged by an unfair or deceptive trade practice or by an unconscionable trade practice of another may be granted an injunction against it under the principles of equity and on terms that the court considers reasonable. Proof of monetary damage, loss of profits or intent to deceive or take unfair advantage of any person is not required." §57-12-10(a). **No monetary loss (loss required for damages);** "Any person who suffers any loss of money or property, real or personal, as a result of any employment by another person of a method, act or practice declared unlawful by the Unfair Practices Act may bring an action to recover actual damages." N.M. Stat. Ann. § 57-12-10(b)	**Not material, no product mention.** (N.M. Stat. Ann. §57-15-2)
New York	**No injury;** "Any person who has been injured by reason of any violation of this section may bring an action in his own name to enjoin such unlawful act or practice an action to recover his actual damages, or both." NY CLS Gen Bus §349(h)	**No private cause of action** (criminal code NY CLS Gen Bus **§190.20)**
N. Carolina	**No injury;** "If any person shall be injured ... by reason of any act or thing done ... in violation of the provisions of this Chapter, such person, firm or corporation so injured shall have a right of action on account of such injury done." N.C. Gen. Stat. §75.16	**No private cause of action** (criminal code N.C. Gen. Stat. **§14-117)**
N. Dakota	**No private cause of action:** See *Trade 'N Post, L.L.C. v. World Duty Free Ams.*, Inc., 2001 ND 116, 628 N.W.2d 707 (2001). (The state UTP (§51-10) does not contain a **private** right of action for damages for violations given the legislature's failure to expressly provide one).	**No injury;** See *Fargo Women's Health Org., Inc. v. FM Women's Help & Caring Connection*, 444 N.W.2d 683 (N.D. 1989) (One injured by a violation of the false advertising statutes (§51-12-01, 51-12-08) may bring an action to recover damages).
Ohio	**No likelihood of injury; only injunctive relief is available:** "A person who is likely to be damaged by a person who commits a deceptive trade practice ... may commence a civil action for injunctive relief." Ohio Rev. Code Ann. §4165.03(a)(1)	No separate FAL

Oklahoma	**No injury (injury required for damages):** "The commission of any act or practice declared to be a violation of the Consumer Protection Act shall render the violator liable to the aggrieved consumer for the payment of actual damages sustained by the customer. Title 15 Okl. St. § 761.1(A) **No likelihood of injury (likelihood of injury required for injunction); equitable relief limited to injunction:** "Any person damaged or likely to be damaged by a deceptive trade practice of another may maintain an action in any court of equitable jurisdiction to prevent, restrain or enjoin such deceptive trade practice. Proof of actual monetary damages, loss of profits or intent shall not be required. If in such action damages are alleged and proved, the plaintiff, in addition to injunctive relief, shall be entitled to recover from the defendant the actual damages sustained by the person. 78 Okl. St. § 54(A) (2002)	**No private cause of action** (criminal code 21 Okl. St. §1502)
Oregon	**No injury/ascertainable loss:** "Any person who suffers any ascertainable loss of money or property ... as a result of ... a method, act or practice declared unlawful ... may bring an individual action in an appropriate court." §646.638(1)	No separate FAL
Pennsylvania	**No purchase/not a customer; no injury:** "Any person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of ... of a method, act or practice declared unlawful ... may bring a private action to recover actual damages." §201-9.2(a)	No separate FAL
Rhode Island	**No purchase/not a customer; no injury:** "Any person who purchases or leases goods or services primarily for personal, family, or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of ... a method, act, or practice declared unlawful ... may bring an action." Or. Rev. Stat. 6-13.1-5.2(a)	**No private cause of action** (criminal code Or. Rev. Stat. §11-18-10)
S. Carolina	**No injury; no representative capacity** "Any person who suffers any ascertainable loss of money or property, real or personal, as a result of ... an unfair or deceptive method, act or practice declared unlawful by § 39-5-20 may bring an action individually, but not in a representative capacity, to recover actual damages." S.C. Code Ann. §39-5-140(a)	No separate FAL
S. Dakota	**No injury; no remedy available other than actual damages;** "Any person who claims to have been adversely affected by any act or a practice declared to be unlawful by § 37-24-6 shall be permitted to bring a civil action for the recovery of actual damages suffered as a result of such act or practice." S.D. Codified Laws §37-24-31	**No product reference** (statement must be "regarding merchandise"); **no private cause of action** (criminal code S.D. Codified Laws §22-41-10)

Tennessee	**No injury/ascertainable loss for actual damages:** "Any person who suffers an ascertainable loss of money or property, ... as a result of the use or employment by another person of an unfair or deceptive act or practice declared to be unlawful by this part, may bring an action individually to recover actual damages." Tenn. Code Ann. §47-18-109(a)(1) **Plaintiff must be "affected" to get injunction; no restitution is available:** "anyone affected by a violation of this part may bring an action ... to enjoin the person who has violated, is violating, or who is otherwise likely to violate this part. Tenn. Code Ann. §47-18-109(b)	**No private cause of action** (criminal code Tenn. Code Ann. §39-14-127)
Texas	**Not a consumer/no purchase; no injury; no reliance:** "A consumer may maintain an action where any of the following constitute a producing cause of economic damages or damages for mental anguish: (1) the use or employment by any person of a false, misleading, or deceptive act or practice that is... relied on by a consumer to the consumer's detriment." Texas Bus & Com Code §17.50(a)	**Not material; no product reference** ("A person commits an offense if ... he intentionally (12) [makes] a materially false or misleading statement in an advertisement for the purchase ... of property or service." §32.42(12)(a)) **No private cause of action** (criminal code)
Utah	**No loss suffered/injury (required for damages); no standing requirements for injunction; no restitution available:** "(2) A consumer who suffers loss as a result of a violation of this chapter may recover, but not in a class action, actual damages or $ 2,000, whichever is greater, plus court costs. (3) Whether a consumer seeks or is entitled to recover damages or has an adequate remedy at law, he may bring a class action for declaratory judgment, an injunction, and appropriate ancillary relief against an act or practice that violates this chapter." (Utah Code Ann. §13-11-19(2)).	**No prior notice:** "Any person or the state may maintain an action to enjoin a continuance of any act in violation of [Utah's Truth in Advertising Act] and, if injured by the act, for the recovery of damages. ... (5) No action for injunctive relief may be brought for a violation of this chapter unless the complaining person first gives notice of the alleged violation to the prospective defendant and provides the prospective defendant an opportunity to promulgate a correction notice by the same media as the allegedly violating advertisement." (Utah Code Ann. §13-11A-4(a)) **Statements not advertising under act's definition:** ""Advertisement" means any written, oral, or graphic statement or representation made by a supplier in connection with the solicitation of business." (Utah Code Ann. §13-11a-2(a))

Vermont	**No reliance; no injury** "Any consumer who contracts for goods or services in reliance upon false or fraudulent representations or practices prohibited by section 2453 ... or who sustains damages or injury as a result of any false or fraudulent representations or practices prohibited by section 2453 of this title, ... may sue for appropriate equitable relief." 9 V.S.A. § 2461(b).	**No private cause of action** (criminal code 13 VSA §2005)
Virginia	**No injury/loss:** "Any person who suffers loss as the result of a violation of [UTP] shall be entitled to bring an individual action to recover damages. Va. Code Ann.§59.1-68.3	**No private cause of action** (criminal code Va. Code Ann. §18.2-216)
Washington	**No injury, no causal connection between injury and deceptive act:** "Any person who is injured in his or her business or property by a violation of [The UTP] ... may bring a civil action in the superior court to enjoin further violations, to recover the actual damages sustained by him or her, or both." (Rev. Code Wash. §19.86.090) See also *Northwest Strategies, Inc v. Buck Medical Servs., Inc.*, 927 F. Supp. 1343 (W.D. Wash. 1996) (The elements required to prove a violation of the UTP are: (1) defendant committed an unfair or deceptive act; (2) the act occurred in the conduct of trade or commerce; (3) the act has an impact on the public interest; (4) plaintiff's injury was caused by defendant's act). **No economic injury:** *See Pickett v. Holland Am. Line-Westours, Inc.*, 35 P.2d 351, 359 (Wash. 2001) (en banc) (noting the need for individualized proof in statutory consumer fraud cases).	**No private cause of action** (criminal code Rev. Code Wash. §9.04.010)
W. Virginia	**No purchase, no ascertainable injury/loss:** "Any person who purchases or leases goods or services and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice prohibited or declared to be unlawful by the provisions of this article, may bring an action." § 46A-6-106(1).	No separate general FAL
Wisconsin	**No economic injury/loss:** "Any person suffering pecuniary loss because of a violation of this section by any other person may sue in any court ... and shall recover such pecuniary loss, together with costs." Wis Stat. §100.18 11(b)(2)	No separate FAL
Wyoming	**Not a consumer, no injury/damages; no reliance; no equitable relief:** "A person relying upon an uncured unlawful deceptive trade practice may bring an action under this act for the damages he has actually suffered as a consumer as a result of such unlawful deceptive trade practice." Wyo. Stat. Ann. §40-12-108(a)	**No private cause of action** (criminal code Wyo. Stat. Ann. §6-3-611)